SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 987

ARTHUR McCOY,

Petitioner,

vs.

STATE OF WEST VIRGINIA.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY.

BRIEF FOR PETITIONER.

Statement of the Case.

Arthur McCoy was indicted by the grand jury of Kanawha County in two counts, alleging the violation of Chapter 61, Article 10, Section 10, of the Code, which forbids the operation of a "pool room wherein lotteries are conducted, etc."

The first count merely charges that the defendant "had unlawfully and knowingly set up and promoted a pool room in violation of Section 10, Article 10, Page 61, of the Official Code of West Virginia," etc. The second count charges that the defendant "was unlawfully connected with and interested in, the management and operation of a pool room in violation of Section 10, Article 10, Chapter 61, of the Official Code of West Virginia."

The defendant demurred to and moved to quash the indictment on the ground that the same was indefinite and failed to apprise him of the charges against him. The demurrer and motion were overruled.

Upon the trial of this case there was introduced in evidence an affidavit of one A. J. Morgan that "he has just cause to believe and does believe, that money and other property to be raffled for and to be won therein * * * in that certain store room situated at 117 Summers Street, City of Charleston," etc., and prayed for the issuance of a search and seizure warrant. A search warrant based upon said affidavit was issued by Edwin S. Watson, a Justice of the Peace of Kanawha County, directed to the Department of Public Safety, and upon said warrant members of the Department of Public Safety made a raid upon the Colonial Pool Room, which is located at 117 Summers Street in Charleston, and a quantity of so-called evidence of horse race betting was confiscated; and the defendant McCoy was taken into custody.

At his trial the defendant demurred to and moved to quash the indictment, which motion and demurrer was overruled.

Over objection of the defendant, the court permitted to be introduced in evidence the so-called horse race tickets and a "form sheet" relating to horse racing.

Points and Authorities.

1. The trial court erred in overruling the demurrer to the indictment.

State v. *Welch,* 69 W. Va. 547;

2 Wharton's Crim. Proc. (1918), 1337;

State v. *Viquesney,* 103 W. Va. 392.

2. The court erred in overruling the motion to quash the affidavit for search warrant.

U. S. Const., Fourth Amendment;
W. Va. Const., Art. 3, Sec. 6;
U. S. v. *Dziadus* (W. Va.), 289 Fed. 837.

3. The court erred in overruling the motion to quash the search warrant issued pursuant to an affidavit based upon information and belief.

State v. *Lacy*, 118 W. Va. 343, 346;
Byars v. *U. S.*, 273 U. S. 28, 71 L. Ed. 520, 47 Sup. Ct. 248;
Simmons v. *U. S.*, 18 F. (2d) 581;
Wagner v. *U. S.*, 8 F. (2d) 581; Annotations: 13 A. L. R. 1316; 27 A. L. R. 709; 3 A. L. R. 1514; 39 A. L. R. 811; 74 A. L. R. 1419;
Osborne v. *Commonwealth*, 214 Ky. 84, 282 S. W. 762.

4. The court erred in admitting in evidence the property taken upon the raid conducted under the search warrant in this case.

State v. *Emsweller*, 78 W. Va. 214, and other cases above cited.

5. The raid and taking of property under the search warrant in this case was an unreasonable search and seizure.

Const. W. Va., Art. 3, Sec. 4;
Const. U. S., Fourth Amendment;
Ripper v. *U. S.*, 78 Fed. 24;
Schenks v. *U. S.*, 2 F. (2d) 185;
Wagner v. *U. S.*, *supra;*
Simmons v. *U. S.*, *supra.*

Argument.

Counsel for the defendant is quite serious in his insistence that the indictment and each count thereof is bad. Our

courts have consistently held that an indictment, to be valid must state every element constituting a crime. The indictment in this case states no element other than that he defendant had set up a pool room, in the one count, and was interested in a pool room in the other count. Nowhere in the indictment are any of the elements stated in the statute. *State* v. *Viquesney, supra,* which holds:

> "Every fact necessary to constitute the crime sought to be charged should be directly and affirmatively alleged in an indictment. No essential element of offense should be left to intendment, implication or recital." State *v.* Welch, 69 W. Va. 547.

The *Viquesney* case, page 393, quotes with approval the statement of the rule as laid down by the Supreme Court of the United States and there cites the authorities.

Any attempt to reconcile the indictment in this case with the accepted rules of pleading, it seems to us, would prove futile and, notwithstanding the reluctance of the courts to sustain a technical objection to a pleading, certainly the error in this indictment is so glaring that there is nothing else for the court to do.

See 2 Wharton's Criminal Procedure (1918), 1337, where the following appears:

> "An indictment or information charging the offense in any of its phases of setting up and maintaining and carrying on and conducting lottery in violation of the statute as in all other charges of criminal offenses must charge such offense with definiteness and certainty so that the court may be able to determine whether the crime charged has been committed, the accused may be apprised of a particular accusation he must meet and the jury know what is the question presented for their determination. Failing to meet these requirements, the indictment or information will be insufficient. Thus a general charge against the accused of having an in-

terest in lotteries or in a named lottery is too general."

Objections were timely made by counsel to the introduction of a complaint for a search warrant based upon information and belief, the warrant itself, and to evidence introduced in support of the warrant.

The statute under which the warrant was issued in this case is rather confusing (Code 62-1-18). In its inception it requires upon oath (not on information) that personal property has been stolen and that it is believed to be concealed in a particular place, the justice shall issue a warrant. But the statute goes further and says: "On like complaint on oath" and provides for the issuance of search warrants in cases similar to this. Does the phrase "on like complaint on oath that personal property has been stolen, etc." or does the phrase refer to "and that it is believed to be concealed"? It is the belief of counsel for the defense that the legislature intended that an affidavit for a search warrant should state such facts upon oath as would justify the issuance of warrants. The statute indicates that the affidavit must show on oath that a crime has been committed and not that the person making the affidavit believes that a crime has been committed.

Our legislature in the new liquor statute saw the viciousness of the liberal requirement for a search warrant in the so-called prohibition statute, and great weight should be given to this in considering the statute with respect to lotteries.

There are several West Virginia cases holding that an affidavit for a search warrant is sufficient, under the so-called "prohibition" statute, which provided that such affidavit could be made on information and belief (Code 1923, Sec. 9, Art. 32A). But that statute has been repealed. In any event, it had no application to cases other than liquor cases.

The later liquor law requires that the affidavit state facts. Code 1937, 62-1-18 (Michie's Sec. 6164). See *State* v. *Lacy,* 118 W. Va. 343, 346.

The Constitution of the United States and the Constitution of this State forbid unreasonable searches and seizures, and provide that no warrant shall issue except upon probable cause. How can the magistrate issuing the warrant know that there is probable cause unless some facts are stated in the affidavit or complaint? In this case there is no fact stated from which the Justice issuing the warrant could determine that there was probable cause for issuing the warrant.

In the case of *Wagner* v. *United States, supra,* the court held that evidence to justify a finding of probable cause must be such as would be admissible on a trial, and that a finding of probable cause must be based on facts and not suspicions, beliefs, surmises or mere conclusions. To the same effect is the case of *Simmons* v. *United States, supra,* in which it is held that affidavits supporting a search warrant must affirm facts by one having personal knowledge and not merely expressed beliefs or suspicions, and though it is not necessary that evidence submitted be sufficient to convict, it must be such as would be admissible before a jury, and that a mere belief of the affiant is not sufficient basis for the warrant.

All of the Federal cases are to the same effect. It necessarily follows that the complaint and warrant being invalid, evidence unlawfully secured under the warrant is not admissible in the trial of the case against the defendant. See *United States* v. *Dziadus, supra,* and *State* v. *Lacy, supra.*

It is quite evident that the Legislature of West Virginia saw the dangers growing out of the former provisions of the Code with respect to search warrants in liquor cases

when it specifically provided in the new section that the affidavit should state facts.

Code 1937, 62-1-18, is the section pertaining to search warrants in this case. While it does not specifically say that the complaint should state facts it does not authorize the issuance of a warrant upon information merely. If it could be said that a search warrant could be issued upon information there would be no end to the havoc that might be wrought. No home would be safe from prying eyes of vicious persons or indiscreet and overzealous officers. For instance, if a ladies' club should be entertaining at bridge at the home of one of the members, there is nothing to prevent the intrusion by officers armed with a search warrant sworn out by anyone, upon information and belief, that gambling is in progress. Unquestionably such would be an unreasonable search and seizure. And the same principle applies to a business establishment.

Respectfully submitted,

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